FILE COPY

FILED
MAR 8 1973
CHARLES ELMORE CROPLEY, JR., CLERK

In the Supreme Court of the United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
Petitioner,

vs.

C. WILLIAM O'NEILL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION OF RESPONDENT JUSTICES OF THE OHIO SUPREME COURT

VICTOR E. DEMARCO
PATRICK F. MCCARTAN
ROBERT J. HOERNER
MARC L. SWARTZBAUGH
1750 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939
Special Counsel for Respondent Justices of the Ohio Supreme Court

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
Petitioner,

vs.

C. WILLIAM O'NEILL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION OF RESPONDENT JUSTICES OF THE OHIO SUPREME COURT

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 33 Ohio Misc. 137 (Vol. XLVI, No. 3 of the *Ohio Bar*, dated February 19, 1973).

RELEVANT STATUTORY PROVISIONS

Certain statutory provisions are relevant in addition to those cited by petitioners. The following sections of Title 28 of the United States Code are relevant:

> § 1391. (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

§ 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The following sections of the Ohio Revised Code are also relevant:

§ 2503.10 The clerk of the supreme court shall keep his office at Columbus, in the rooms provided for that purpose. He shall be furnished by the state with all necessary printing, books, blanks, stationery, and furniture.

§2503.32 The records and papers pertaining to the business of the supreme court shall be kept in the rooms provided for the court. They shall not be removed therefrom unless by direction of the court, and then only so long as its business requires.

§2503.33 The chief justice and the judges of the supreme court shall meet at Columbus on the first Tuesday after the first Monday of January of each year to hold a term of court.

QUESTIONS PRESENTED

The first question sought to be raised by petitioner is not presented on the record. Accordingly, the first question must be rephrased as follows:

1. Did the Court of Appeals properly enter an order under 28 U.S.C. § 1651 directing the District Court to vacate its temporary restraining order, entered without hearing and without notice, which prevented the Ohio Supreme Court "from taking any further action in disciplinary proceedings against" petitioner which were then pending before it?

BLEED THROUGH POOR COPY

COUNTERSTATEMENT OF CASE

Respondent Justices of the Ohio Supreme Court present the following facts in addition to those set out by the Petitioner in his Statement of the Case:

Following the filing with the Ohio Supreme Court on September 1, 1972 of the recommendations of the Board of Grievances and Discipline, the Supreme Court set the matter for hearing on October 10. At the request of petitioner, the hearing date was continued to November 15, 1972.

After Judge Peck entered his Stay of the District Court's Temporary Restraining Order on October 27 (Pet. 10), petitioner filed a far-ranging brief of 35 pages in support of a motion to dissolve that stay which, in addition, expansively canvassed the merits of respondents' mandamus petition. Accordingly, while the Sixth Circuit's Order of November 10 was prior to the date it had originally scheduled for hearing on the petition, the Order was entered only after it had had an opportunity to review petitioner's extensive brief.

The Order actually entered by the Sixth Circuit on November 10 appears at Pet. App. A-46, A-47 and for convenience is quoted here in full:

> "The United States District Court for the Northern District of Ohio is directed:
>
> "(1) To vacate and withdraw the temporary restraining order of October 25, 1972, enjoining the Ohio Supreme Court from taking any further action in disciplinary proceedings against Judge George S. Heitzler, Jr. and from enforcing the order of the Supreme Court of September 8, 1972; and

"(2) To dismiss the action filed by Judge Heitzler against the Justices of the Supreme Court of Ohio, No. C72-1140, for lack of venue."

It is important to note, in view of the first question sought to be presented by petitioner, that dismissal of the action was directed solely on the grounds of lack of venue. The only order resulting from application of the abstention doctrine and federal principles was the direction that the lower court's temporary restraining order preventing the Ohio Supreme Court from taking further action be vacated.

Following the Sixth Circuit's entry of its November 10 Order, the Ohio Supreme Court did go forward with the scheduled November 15th hearing in petitioner's disciplinary proceeding and, on December 15, 1972, issued a 19 page opinion confirming the recommendations of the Board and ordering petitioner indefinitely suspended from the practice of law. That opinion, *Cincinnati Bar Association v. Heitzler,* appears in 32 Ohio St. 2d at 214 and is set out as an appendix to this brief. When that opinion is compared with petitioner's federal court complaint (Pet. App. A-1 - A-29), it becomes clear that petitioner raised before the Ohio Supreme Court, and that the Ohio Supreme Court considered, essentially all of the issues underlying his 42 U.S.C. § 1983 federal complaint.

Petitioner thereafter asked the Ohio Supreme Court for a stay of its order, which was denied on January 12, 1973, pending the filing of a petition for a writ of certiorari in this Court, so it is to be presumed that on or before its March 15, 1973 due date petitioner will file such a petition with this Court asking for direct review of the Ohio Supreme Court's December 15 decision. Petitioner is thus, by this petition, in the anomalous position of seeking to obtain collateral review of his claims before he has sought direct review of them.

BLEED THROUGH, POOR COPY

ARGUMENT

1. The first question sought to be presented by petitioner is moot and, in any event, was correctly decided under settled principles.

In his first question, petitioner attempts to raise the issue whether the Sixth Circuit improperly divested the court below "of its lawful and proper jurisdiction already assumed in a federal civil rights suit." But the only "jurisdiction," lawful, proper, assumed or otherwise, of which the Sixth Circuit divested the District Court, was its "jurisdiction" to enforce "the temporary restraining order of October 25, 1972," entered without notice or hearing, "enjoining the Ohio Supreme Court from taking any further action in disciplinary proceedings against Judge George S. Heitzler, Jr." But there is now no further action for the Ohio Supreme Court to take. It has completed its action with respect to the disciplinary proceedings against petitioner. It has handed down its final judgment confirming the recommendations of the Board and ordering petitioner indefinitely suspended from the practice of law. There is nothing more for it to do. Accordingly, the first question sought to be presented is moot.

In any event, paragraph one of the Sixth Circuit's November 10 Order was clearly in accordance with applicable law and usages approved by this Court. This Court has recently emphasized "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). Petitioner's anemic claim below that the Board's charges infringed his freedom of association in choosing his luncheon companions (Pet. App. A-17), which is the only factual allegation made in the complaint of interference with First Amendment freedoms, was certainly

inadequate to invoke the narrow exception of *Dombroski v. Pfister*, 380 U.S. 479 (1965), as further explicated in *Younger v. Harris*, 401 U.S. 37 (1971), which decisions are applicable because of the "quasi-criminal" character of bar disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544, 551 (1968). Such an allegation, at most, suggests an incidental "restriction of plaintiff's business and social activities," which is not the sort of irreparable injury to vital First Amendment freedoms which permits federal intervention. *Shaw v. Garrison*, 293 F. Supp. 937, 950 (E.D. La.), *aff'd per curiam* 393 U.S. 220 (1968).

There was no absence of "an opportunity to raise his constitutional claims" in state court, *Younger v. Harris*, *supra*, 401 U.S. at 49, for they not only could have been, but were, raised in the Ohio Supreme Court, and will almost certainly be raised here on a petition for direct review of the Ohio Supreme Court's decision. Nor were there any allegations that the proceedings against petitioner were brought "with no intention of pressing the charges or with no expectation of obtaining" relief, *Cameron v. Johnson*, 390 U.S. 611, 619 (1968); indeed, the fact that petitioner was indefinitely suspended from the practice of law shows that the proceedings against him were not pretensive or frivolous but were brought in good faith to achieve relief authorized in such proceedings. No conflict of circuits is alleged, and petitioner's strained attempt (Pet. 26) to distinguish *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir.), *cert. denied*, 93 S. Ct. 126 (1972) indicates that the Second Circuit is fully in accord with the Sixth Circuit on the issue presented.

Surely a state's concern with the integrity of its bar is as subject to deference by the federal judiciary as were the oil and gas regulatory policies which counseled federal abstention in favor of state court decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Mandamus was a proper remedy, not only as "the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations," *Will v. United States*, 389 U.S. 90, 95 (1967), but also as a wise and necessary exercise by the Sixth Circuit of its supervisory control over the district courts within its jurisdiction, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). The writ issued by the Sixth Circuit was fully consonant with and required by this Court's decisions counselling respect for state court proceedings in sensitive areas of federal-state relations.

2. The Sixth Circuit's decision ordering the complaint below dismissed for improper venue was a routine application of settled law, presenting no question of importance for this Court.

The Sixth Circuit ordered that the complaint be dismissed because venue was improper under 28 U.S.C. § 1391(b). It first held that the official residence of the Justices of the Ohio Supreme Court was Columbus, Ohio, in the Southern District of Ohio. This decision was clearly correct in light of O.R.C. §§ 2503.10, 2503.32, 2503.33 (p. 2, *supra*) and 2503.34 (Pet. 4), but whether it was or was not correct, this Court has many times said that it does not sit to pass judgment on the resolution of state law questions by the Circuit within whose jurisdiction the state is located. E.g., *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-08 (1949). Since for federal venue purposes, the official residence of all defendants was solely in the Southern District, and since they were manifestly sued in their official capacity, the Sixth Circuit quite correctly and routinely held that venue was improper in the Northern District of Ohio under 28 U.S.C. § 1391(b), and that 28 U.S.C. § 1392(a) had no application.

Accord, e.g., *United Office & Professional Workers v. Smiley*, 75 F. Supp. 695, 699 (E.D. Pa. 1946). In any event, *all* respondents could have been reached in a single action in the Southern District. The cases hold that § 1392 (a) has no application in such circumstances. *Hawks v. Maryland & Penn. R. Co.*, 90 F. Supp. 284 (E.D. Pa. 1950), *followed, Johnson v. B. G. Coon Construction Co*, 195 F. Supp. 197 (E.D. Pa. 1960).

The District Court, in issuing its *ex parte* temporary restraining order, had flagrantly disregarded applicable federal principles. This precipitous and improvident action had created circumstances which were "both exceptional and extraordinary" (Pet. App. A-47). The Court of Appeals, which had the case before it and was therefore required to issue some extraordinary relief, properly also took action in respect of the lack of venue, since any further proceedings in the United States District Court for the Northern District would have been a nullity. As the Court of Appeals indicated, there was precedent for this use of the All Writs Act. *Holub Industries, Inc. v. Wyche*, 290 F.2d 852 (4th Cir. 1961). Since petitioner's residence was in the Southern District as was the official residence of all respondents, and since no statute of limitations problems were present, the Sixth Circuit acted within its discretion in ordering dismissal rather than transfer under 28 U.S.C. § 1406(a). See, e.g., *Optico Corp. v. Standard Tool Co.*, 285 F. Supp. 46, 50 at note 4 (E.D. Pa. 1968).

CONCLUSION

The first question sought to be presented is moot. The decision below correctly applied settled principles and no conflict of circuits or other reasons exist which occasion intervention by this Court. It will be time enough to consider whatever validity, if any, petitioner's underlying constitutional claims may have when he seeks direct review of the Ohio Supreme Court's December 15 decision ordering him indefinitely suspended. The present petition should be denied.

Respectfully submitted,

VICTOR E. DEMARCO
PATRICK F. MCCARTAN
ROBERT J. HOERNER
MARC L. SWARTZBAUGH
1750 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939
Special Counsel for Respondent Justices of the Ohio Supreme Court

APPENDIX

Opinion of the Supreme Court of Ohio in the Case of Cincinnati Bar Association v. Heitzler

[Cite as Cincinnati Bar Assn. v. Heitzler (1972), 32 Ohio St. 2d 214.]

[214]

Attorneys at law—Misconduct—Disciplinary action—Indefinite suspension from practice of law—Acts warranting.

(D. D. No. 72-3—Decided December 15, 1972.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Respondent, an attorney at law duly admitted to practice in Ohio, was appointed Judge of the Cincinnati Municipal Court on February 15, 1963, which office he continued to hold until after being unsuccessful in the ensuing election. Respondent was again appointed Judge of the Cincinnati Municipal Court on March 23, 1964, was thereafter elected and re-elected. He continued to hold said office until January 5, 1969. At that time he assumed, by election, the office of Judge of the Court of Common Pleas of Hamilton County, Division of Domestic Relations.

[215] On August 16, 1971, the Cincinnati Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline, charging respondent with violations of the Canons of Judicial Ethics. On October 4, 1971, the bar association filed a supplemental complaint, charging respondent, through his counsel, with attempting improperly to influence the course of the disciplinary proceedings.

On December 16, 1971, the matter was heard before a panel of three members of the Board of Commissioners. The hearing consumed six days over an extended period of time, ending on January 7, 1972, during which the panel heard by testimony or stipulation, more than fifty witnesses, and received forty-seven documents in evidence. On August 4, 1972, the panel submitted its findings of fact and recommendations to the secretary of the Board of Commissioners, which findings and recommendations were thereupon reviewed and adopted by the Board of Commissioners, and were filed with this court on September 1, 1972.

The complaint of relator set forth eleven counts of alleged violations of the Canons of Judicial Ethics. Respondent's answer admitted many of the factual allegations of the complaint, but denied any misconduct or any violation of the Canons of Judicial Ethics.

The first count alleged that while respondent was separated from his first wife, from the latter part of 1969 until September 1970, one Carol Chasteen (now respondent's second wife) was present frequently in his apartment, and that their conduct "was such as to cause members of the apartment complex and others to believe that they were living together." Respondent contended that he employed Miss Chasteen "as an attendant for respondent's afflicted son" and that he "did not violate any judicial canon and did not live with the said, Carol Chasteen," but he did not specifically deny that their conduct was such as to give the impression alleged. Respondent was separated from his first wife in early 1969, and executed a separation agreement **[216]** with her in January, 1970. She obtained a Mexican divorce from him in October, 1970, and respondent and Miss Chasteen were married in November, 1970, both occurring subsequent to respondent's

voluntary appearance before a committee of relator to testify concerning his personal conduct. The board found that the evidence sustained the allegations of this count.

The second count alleged that respondent took an Ohio Bar Association trip to Majorca, Spain, in October 1969, accompanied by Miss Carol Chasteen, at his expense, and that during that trip his conduct "was offensive to other members of the Ohio Bar Association and their wives." Respondent admitted making the trip to Majorca, but denied engaging in any offensive conduct during the trip, and denied violating any canon of judicial ethics in connection therewith. The board, although finding evidence of questionable conduct, found the evidence to be "equally balanced as to whether respondent's conduct was excessive for such an outing or essentially different from that of the ordinary person" and thus found that the evidence did not support a finding against respondent upon this count.

The third count alleged that respondent also took two trips to Mexico with Miss Chasteen, which was admitted by respondent, but he denied engaging in any course of offensive conduct. This count was dismissed by the panel.

The fourth count alleged that respondent, while a judge, was observed in a downtown Cincinnati hotel in a state of intoxication, and conducting himself in a loud and offensive manner. Respondent, while admitting to having been at the hotel on occasion, denied ever conducting himself in a loud or offensive manner, or that he ever conducted himself "in any manner, save and except, that in keeping with his elected position." The board found that the evidence "fell far short" of sustaining the allegations of this count.

The fifth count alleged that respondent engaged in immoral conduct at a downtown Cincinnati hotel, which

was denied by respondent, who demanded "strict proof thereof." [217] The board found the evidence insufficient to sustain the allegations of this count.

The sixth count, which alleged impropriety by respondent in connection with his first wife's obtaining the Mexican divorce, was dismissed by the panel.

The seventh count, which alleged that respondent's personal financial investments in Harmony Loan Company, a Kentucky corporation, were in direct circumvention of Kentucky law, was dismissed by the panel for lack of sufficient evidence.

The eighth count alleged that respondent was guilty of misconduct in connection with his association with the Harmony Loan Company and its officers and directors. Respondent admitted the factual allegations of this count, but specifically denied that he violated any canon of judicial ethics in connection therewith. The board made a finding of misconduct in connection with this charge.

The ninth count alleged that respondent, while a judge of the Cincinnati Municipal Court, and a director of Harmony Loan Company, signed 487 orders in 357 cases wherein Harmony Loan Company was a party. Respondent denied this count "for want of knowledge," and contended that the count could not be considered for the reason that the acts involved did not occur within respondent's current term of office. At the hearing, respondent admitted signing numerous orders in cases brought by Harmony Loan Company while he was both a judge and a director of that corporation, but contended that these involved only default judgments, confessions of judgment, garnishments and motions, that they did not involve any contested matters, and that they were only ministerial acts. The board made a finding of misconduct in connection with this count.

BLEED THROUGH POOR COPY

The tenth count alleged misconduct by respondent in hiring as a constable a man with a lengthy criminal record, who was subsequently discharged because of alleged bribery attempts on his part. Respondent admitted hiring the employee knowing of his criminal record and discharging him **[218]** under the circumstances alleged, but contended that the employee was "in a menial, non-sensitive position" and that he was hired and retained "for many reasons other than political." The board made a finding of misconduct in connection with this count.

The eleventh count alleged that respondent hired his son and daughter to work in the Court of Domestic Relations. Respondent admitted these allegations, but denied any misconduct or violation of the Canons of Judicial Ethics in connection therewith. The board concluded that, although "such employment may technically amount to nepotism, the board believes that such employment did not amount to an intentional exploitation of nepotism."

The Board dismissed the supplemental complaint, finding that the evidence failed to establish "that respondent directed the actions of his counsel which led to the filing of the supplemental complaint."

The board found respondent to have violated Canons 4, 12, 13, 25, 26, 29, 33 and 34 of the Canons of Judicial Ethics adopted by this court, concluded "that respondent over an extended period of time has displayed continuing indifference to the Canons of Judicial Ethics, 'as a proper guide and reminder for judges,' " and recommended that respondent be suspended for an indefinite period from the practice of law.

The respondent not only filed objections to the findings and recommendations of the Board of Commissioners on Grievances and Discipline, but also filed a motion to quash and dismiss those findings and recommendations,

and to dismiss and recuse each and every member of the board.

Following the filing of the findings of fact and recommendations by the Board of Commissioners on Grievances and Discipline, this court authorized and directed the Chief Justice to order respondent to hear no further cases or other matters and to perform no other judicial duties until a decision is rendered in this matter. (*Cincinnati Bar Assn. v. Heitzler* [1972], 31 Ohio St. 2d 187.)

The cause is now before this court for consideration **[219]** of the report of the board and the objections and motions of the respondent.

Mr. R. O. Klausmeyer, Mr. John J. Getgey and *Mr. C. Donald Heile,* for relator.

Mr. Stanley E. Preiser, Mr. John B. Carrico and *Mr. David C. McCue,* for respondent.

Per Curiam. Respondent alleges that his constitutional rights were violated and he was denied due process of law by the Board of Commissioners on Grievances and Discipline, contending that his counsel was denied the right to file a brief on the merits with the hearing panel; that a witness for relator and a member of the board sat with the board when they discussed this case and made their findings and recommendations; that he was denied the right to be heard by the board; that the board made its findings and recommendations without "an indepth review of the transcript of testimony and the exhibits"; that three members of the board had heard evidence against respondent in another proceeding; and that the board proceeded under Gov. R. V rather than Gov. R. VI.

A review of the record indicates that the proceedings of both the board and the hearing panel were conducted in accordance with Rule V of the Rules For The Government

BLEED THROUGH POOR COPY

Of The Bar Of Ohio (formerly Rule XVIII of the Rules Of Practice).

While there was some confusion as to the time for filing briefs with the hearing panel, respondent was not prejudiced in this regard. The hearing panel and the board determined the matter prior to the actual filing of briefs by either relator or respondent. Furthermore, Gov. R. V confers no right upon either relator or respondent to file briefs before either the hearing panel or the board, and the filing of same is a matter within the discretion of the board or hearing panel. Respondent was given every opportunity to present any relevant evidence that he desired to present to the hearing panel.

[220] Although a member of the board was a witness for the relator, the minutes of the board clearly indicate that such member "took no part in the discussion or voting" in the case.

Respondent was given a full and complete hearing before the hearing panel. Gov. R. V does not provide for an additional hearing before the entire board where the matter has been heard by a hearing panel. Neither does that rule, nor due process, require that each member of the board make "an indepth review of the transcript of testimony and the exhibits." The fact that three members of the board may have heard evidence against respondent in another proceeding does not disqualify them as members of the board. There is no indication that the findings and recommendations of the board herein were not predicated upon the complaint of relator, the answer of respondent, and the testimony and exhibits received in evidence before the hearing panel. Furthermore, there could be no prejudice to respondent in any event, since the action of the board was unanimous.

In addition, it is this court and not the board that makes the ultimate conclusion, both as to the facts and as to the action, if any, that should be taken. As stated in *Mahoning County Bar Assn. v. Ruffalo* (1964), 176 Ohio St. 263:

> "In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts."

That both the hearing panel and the board afforded respondent a fair consideration and determination of the issues is shown by their action with regard to Counts 2, 3, and 11 of the complaint. The evidence clearly is sufficient to support a finding of misconduct with respect to all three counts. Yet, the hearing panel dismissed Count 3, and both **[221]** the hearing panel and the board found the evidence to be insufficient to support a finding of misconduct with regard to Counts 2 and 11.

Canon 4 of the Canons of Judicial Ethics requires that a judge's personal behavior in his everyday life "should be beyond reproach." Respondent admitted that he, while still married to, but separated from, his first wife, took his "girl friend" (now his second wife) with him, at his expense, on the trip to Majorca and on the two trips to Mexico, but he testified that they did not occupy the same room on any of the trips. Such conduct is not behavior beyond reproach within the meaning of Canon 4. Furthermore, the evidence permitted a finding of other offensive conduct by respondent during the Majorca trip. The board, while finding evidence of such conduct, found it to be "equally balanced, as to whether respondent's conduct was

BLEED THROUGH, POOR COPY

excessive" or "essentially different from that of the ordinary person, including members of the judiciary, under similar circumstances." However, a judge is charged with the responsibility of conforming to a higher standard of personal behavior than the ordinary person. A judge's conduct of personal behavior must be "beyond reproach." Improper conduct which may be overlooked when committed by the ordinary person, or even a lawyer, cannot be overlooked when committed by a judge. By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect. As stated in Canon 34, "In every particular his conduct should be above reproach."

Respondent also admitted employing both his son and his daughter as charged by Count 11. Canon 12 provides that a judge should "avoid nepotism and undue favoritism in his appointments." The board, although finding this to be technically nepotism, found that it "did not amount to an intentional exploitation of nepotism."

Respondent contends further that the board should have proceeded pursuant to Gov. R. VI, rather than Gov. [222] R. V. Gov. R. VI relates to proceedings for removal of judges, whereas Gov. R. V. relates to the disciplining of members of the legal profession of Ohio. They are not mutually exclusive. A member of the legal profession, who is also a judge, may engage in misconduct which not only requires his removal from office, but also requires that disciplinary action be taken against him with regard to his right to practice law after such removal from office. Gov. R. V expressly provides that disciplinary action may be instituted against a member of the legal profession for violation of the Canons of Judicial Ethics while such member of the legal profession holds the office of judge.

This court previously considered the matter and held, in paragraphs five and six of the syllabus of *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17, that:

> "5. Judges who are required by statute to be attorneys at law must necessarily maintain their status as members of the legal profession, and the Supreme Court of Ohio, by virtue of its inherent power with reference to the disciplining of members of such profession, may provide by rule the basis for and the procedure to be followed in the disciplining of such members who hold judicial positions.
>
> "6. The Canons of Judicial Ethics, as adopted by and made a rule of the Supreme Court of Ohio, provide a basis for the disciplining of members of the legal profession who hold judicial positions, and a breach thereof subjects such a member of the legal profession to disciplinary action according to the procedure set out in Rule XXVII of such court."

Respondent contends that since R. C. 2701.12 and Gov. R. VI were adopted subsequent to *Franko*, these constitute the exclusive method for disciplinary action against a member of the legal profession who is a judge for misconduct in office. We reject this contention. R. C. 2701.12 and Gov. R. VI do provide procedure for removal of a judge from office. Gov. R. V, on the other hand, does not pertain to the removal of judges from office, although proceedings under that rule may result in disqualification of a judge **[223]** because he is required to be a lawyer. See *State, ex rel. Saxbe v. Franko* (1958), 168 Ohio St. 338.

Gov. R. V(4) provides that:

> "* * * all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and

BLEED THROUGH POOR COPY

judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. * * *" Gov. R. V(5)(a) defines misconduct as:

"* * * any violation of any provision of the oath of office taken upon admission to the practice of law in this state, or any violation of the Code of Professional Responsibility or the Canons of Judicial Ethics as adopted by the court from time to time, disobedience of these rules or of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude. * * *"

While it might be a more logical procedure, in cases of lawyers who are judges, to first proceed under Gov. R. VI for removal from office, and then proceed under Gov. R. V with respect to disciplinary action as a member of the legal profession, we find no error or prejudice to respondent in proceeding first with proceedings pursuant to Gov. R. V. This is especially true in this case, since the respondent at the outset of the filing of the complaint, requested that the proceedings be pursuant to Gov. R. V (then Rule XVIII of the Rules of Practice). The supplemental complaint alleged that respondent utilized improper methods in attempting to influence the proceedings to be pursuant to Rule XVIII (now Gov. R. V) rather than Rule XXI (now Gov. R. VI). Respondent, in his answer thereto, stated that "respondent admits that through his counsel by invitation he * * * did suggest that all interests were best served in the disposition of this cause if pro-

ceedings were [224] governed by Rule XVIII." Respondent cannot now be heard to complain that his "suggestion" was followed. The evidence received by the hearing panel also indicates that this was the desire of the respondent. Accordingly, respondent's motions to dismiss and to quash are overruled.

We now turn to consideration of the findings of the board. The finding of the board that the respondent's personal behavior in his everyday life, while a judge, gave the appearance of impropriety and was not beyond reproach (Count 1) and constituted a violation of Canon 4, is supported by, and required by, the evidence.

The board's finding that respondent violated Canons 13, 25 and 34 in connection with his business association with the Harmony Loan Company is also supported and required by the evidence. Respondent contends that he has not violated Canon 25 because other judges in Ohio also serve on boards of directors of savings and loan associations.

Canon 25 of the Canons of Judicial Ethics, as adopted by the then members of this court on January 27, 1954 (160 Ohio St.), differs from Canon 25 as adopted by the American Bar Association. Canon 25 provides that:

> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, [n]or use the power of his office [or the influence of his name] to promote the business interests of others; he should not solicit for

charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

The foregoing quoted language, in brackets, is included in Canon 25 as adopted by the American Bar Association but is not included in Canon 25 as adopted by this [225] court in 1954. That court, by omitting the language in brackets from American Bar Canon 25, seemingly intended to give judges greater latitude in their business relationships than would be permitted by the American Bar Canon. In view thereof, it would appear that a judge does not necessarily violate Canon 25, as adopted in Ohio, *merely by serving* as a member of the board of directors of a loan company or a savings and loan association, where he in good faith discharges his duties as a director and nothing more is involved.*

If the fact of a judge's membership on the board of directors is used by the corporation to persuade others to patronize it or is used by the corporation to promote its business interests, the judge, by accepting membership on the board of directors, has given ground for "reasonable

---

* The additional language explains the conclusion to the contrary in Opinion 254 of the Committee on Professional Ethics and Grievances of the American Bar Association. The Committee on Legal Ethics and Professional Conduct of the Ohio Bar Association apparently did not take cognizance of the difference in language between Canon 25 as adopted for Ohio, and that as adopted by the American Bar Association, in its Opinion No. 19, which was reaffirmed and reported in the October 23, 1972, issue of Ohio Bar (XLV Ohio Bar No. 41, page 1423). *Whether this will continue to be the rule for conduct of judges depends upon the action of this court in its consideration of the new Code of Judicial Conduct adopted by the American Bar Association, Canon 4 of which expressly prohibits a judge from serving as an officer, director, employee or advisor of any business organization.*

suspicion" that the judge is using "the power or prestige of his office" for that purpose. This is especially true if the judge does not regularly attend meetings of the board of directors, but is a member of the board in name only.

Even if under the Ohio Canon 25, respondent could serve as a member of the instant board of directors, he violated Canon 25 when Harmony Loan misused the fact of his membership. When he accepted membership on that board he undertook the affirmative duty to make certain that there would be no misuse made by Harmony of that membership.

[226] Canon 13 provides in part, that a judge "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor."

Canon 33 provides, in part, that a judge should "in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

Count 8 alleges that:

> "On the board of directors of Harmony Loan Company have been Joseph Becker, bailiff for Judge Heitzler in both courts, and Robert Stone, a Cincinnati attorney who is a personal friend of Judge Heitzler, who appears with some frequency before Judge Heitzler, and frequently has lunch in a public restaurant with Judge Heitzler.
>
> "James J. Matthews, president of Harmony Loan Company, was treasurer of Judge Heitzler's campaign in 1968 for the Court of Domestic Relations.

"Ralph Crisci, chief referee in Domestic Relations Court, was at one time assistant vice president and attorney for Harmony Loan Company.

"Sylvan Reisenfield, attorney for Harmony Loan Company, appears in the Domestic Relations Court before Judge Heitzler.

"Harmony Loan Company has from time to time issued brochures which contain the pictures and identifying names of its directors and officers, including Joseph Becker, Robert Stone and James Matthews, and Judge Heitzler.

"Relator says that in knowingly associating with Harmony Loan Company and its officers and directors and in permitting the publicity of his name as a judge in connection with the business of Harmony Loan Company, Judge Heitzler has violated Judicial Canons 13, 25, 33, and 34."

Respondent, as his answer to said count, stated that he "admits the allegations contained in paragraph 8 of said complaint and certificate filed herein, but specially [227] and specifically denies that he violated any Canon of Judicial Ethics." This admission, together with the evidence presented at the hearing, fully justifies a finding of misconduct by respondent in connection with his association with Harmony Loan Company.

Count 9 alleges misconduct by respondent in his handling of numerous cases in which Harmony Loan Company was a party while he was a judge of the Cincinnati Municipal Court. Respondent admitted handling such cases at a time when he was both a director of the company and an investor therein.

Canon 26 provides, in part, that "where he has a personal investment in an enterprise involved in litigation

in the court, he should disqualify himself from acting in such litigation unless the interest is so slight that he does not believe it could affect the impartial performance of his official duties and the parties to such litigation are so informed and do not object."

Canon 29 provides, in part, that "a judge should abstain from performing or taking part in any judicial act in which his personal interests are involved."

Respondent contends that since the evidence indicates that he tried no "contested" case involving the Harmony Loan Company, and since the acts involved occurred during a prior term of office as judge of a different court, that he cannot now be charged with misconduct with regard thereto.

The evidence does not indicate that respondent heard any "contested" cases involving Harmony Loan Company, nor does it indicate that respondent disqualified himself from handling such cases. Respondent granted numerous default judgments and confessed judgments to Harmony Loan Company while a judge of Cincinnati Municipal Court at a time when he had a substantial investment in said company and was a director thereof. Respondent also signed garnishment orders, continuances, dismissals, and ruled upon some motions.

The granting of a default judgment or a confessed [228] judgment necessarily involves a judicial determination of whether the plaintiff is entitled thereto. The granting of a default or confessed judgment to an enterprise in which a judge has a personal investment constitutes acting in litigation involving such enterprise, in violation of Canon 26. Even where the judge's interest is so slight that it could not affect the impartial performance of his official duties, the judge cannot so advise the

adverse parties, nor do they have any opportunity to object, where the judgment is entered by default or confession. Furthermore, in view of the numerous cases involving Harmony Loan Company in which respondent performed judicial acts, there is no possibility that his actions were the result of oversight.

In support of his position, respondent relies upon authority to the effect that a default judgment granted by an interested judge does not render such judgment void or subject to collateral attack in the absence of fraud. See *Ashland Bank & Savings Co. v. Houseman* (1915), 5 Ohio App. 165. However, that has no bearing upon the propriety or ethical considerations of a judge so acting.

Respondent contends further that most of the cases in which he acted were first heard by a referee. However, the remainder of the cases were not so heard. Furthermore, assuming the cases were first heard by a referee and then the entry of judgment was signed by respondent, respondent took no precaution to prevent the appearance of impropriety in connection therewith, which the Canons of Judicial Ethics require of him.

In support of his contention that misconduct during a previous term cannot now be considered, respondent relies upon *State, ex rel. Vogt, v. Donahey* (1923), 108 Ohio St. 440; *McMillen v. Diehl* (1934), 128 Ohio St. 212; and *State, ex rel. Stokes, v. Probate Court* (1970), 22 Ohio St. 2d 120, all of which hold that, under the applicable statutes, an officer cannot be removed from office for misconduct during a previous term of office. However, it is pointed out in *Stokes* that this is not the result where a statute specifically provides for disqualification or removal for misconduct **[229]** during a previous term, citing *In re Coppola* (1951), 155 Ohio St. 329, wherein it is stated, at page 332:

> "* * * the General Assembly has the power to require reasonable qualifications for office and if a statute provides that misfeasance and malfeasance during a previous term shall be a ground for the removal of a public official during his existing term, such a statute must be given effect."

R. C. 2701.12 specifically provides that a violation of the Canons of Judicial Ethics by a judge "since first elected or appointed to judicial office" constitutes cause for removal of such judge from office.

Furthermore, as pointed out above, this is not a removal-from-office proceeding, although it may indirectly have that effect. Rather, this proceeding is a disciplinary action against a member of the legal profession, who is a judge, and will result in disciplinary action against respondent as a member of the legal profession. As stated in the second paragraph of the syllabus of *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17:

> "The legal profession of Ohio includes every person who has been admitted to the practice of law in this state, by and under the rules for admittance thereto as adopted by the Supreme Court of Ohio, whose name is maintained on the Roll of Attorneys kept by such court, regardless of the subsequent capacity or status of such person."

There is no doubt that respondent was a member of the legal profession at the time involved, and continues to be, and it is that status which is the subject of this proceeding. Thus, the misconduct alleged occurred while respondent was a member of the legal profession of Ohio, regardless of whether it occurred during his existing, or a previous, term of office as a judge.

The evidence clearly supports the finding of the board that respondent violated the Canons of Judicial Ethics by handling numerous cases in which Harmony Loan Company was a party, at a time when he was a director of, and had a substantial investment in, said company.

[230] As to Count 10, respondent admitted that he hired as a constable a man with a lengthy criminal record, knowing of such record. Canon 12 provides, in part, that "trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage." Canon 34 provides, in part, that a judge should "deal with his appointments as a public trust."

Respondent contends that these canons are not applicable to the employee in question because he was a "glorified usher" or "go for," being one who "fetches" the parties and their attorneys when it is time for their appearance. The employee was hired as a constable. Respondent described his duties as "to schedule various cases in before the various referees at the proper time." Respondent testified further with respect to this constable's duties that he "was to stand out in the hall and a list of the various hearings before the referees was furnished him. He would pull the folders and then as the respective attorneys came in with their clients ready to go on a case on preliminary motions and so forth, escort them into the various referee hearing rooms and come out. In the event he could not get cases or one referee was tied up in a rather lengthy case, then he would get another referee and shift cases around." We find that Canon 12 does apply to a constable with such duties

Respondent also attempts to justify employment of this constable with a criminal record, on the grounds of rehabilitation, and testified that the practice followed by Hamilton County offices in the employment of persons with criminal records has been "if the man has paid his debt to society to give him a chance and put him to work." We agree with the board that such rehabilitation should have been attempted by some means other than employment as a constable in Domestic Relations Court. Respondent testified **[231]** further that the employee with the criminal record had assisted him in his "most recent campaign for Domestic Relations Judge, and one or two of the prior campaigns for Municipal Court."

Canon 12 requires that persons employed to aid in the administration of justice should have the strictest probity and should be selected with a view solely to their character and fitness. Obviously, employees with criminal records employed for the purpose of aiding in their rehabilitation have not been "selected with a view solely to their character and fitness." "Probity" means "unimpeachable integrity." Obviously, a person with a lengthy criminal record, including one felony conviction for burglary, is not possessed of the strictest probity. Respondent completely ignored Canon 12 with respect to this employment.

Evidence was received that the employee in question solicited bribes from at least two persons, one of which was allegedly paid. When the person, from whom the bribe not paid was solicited, advised respondent of the solicitation, respondent did not immediately discharge the employee in question, but retained him as an employee until the advent of newspaper publicity concerning the alleged bribe attempt. The only investigation respondent made was to ask the employee in question, and

respondent stated: "I kept him on because I had no evidence whatsoever that he had done anything wrong." This was apparently predicated upon the failure of the person reporting the solicitation for a bribe to produce for respondent a tape recording of the bribe solicitation. Respondent stated that: "* * * when he was suspended, he was first suspended when portions of an excerpt from a so-called tape appeared in the paper and he was linked to that and he was suspended without pay. * * *"

The finding by the board of misconduct by respondent in the hiring and retaining of the employee with a criminal record is fully supported by the evidence.

Respondent contends also that "even if the findings of fact by a board of commissioners are supported by the [232] evidence and confirmed by the Supreme Court of Ohio, the recommendations of the board of commissioners as to the disciplinary action to be administered are too severe for the violations proven under the circumstances."

The facts of this case clearly indicate either that respondent has little or no concept of the ethical behavior required of a judge by the Canons of Judicial Ethics in both his personal and official conduct or that he has such concept, but thinks so little of it that he disregards it completely. As stated in the opinion in *Franko, supra,* at page 36: "Either attitude toward ethics from an attorney at law undeniably would be reprehensible—from an attorney at law who has assumed a judgeship it is inexcusable." Misconduct by a lawyer who is a judge brings even greater discredit upon the legal profession than the same misconduct if performed by a lawyer who has not been entrusted with that high office. The board found that respondent by his conduct has violated Canons 4, 12, 13, 25, 26, 29, 33 and 34 of the Canons of Judicial Ethics.

Having carefully reviewed and considered the entire record, and the objections of the respondent and the briefs submitted, we conclude that the findings of the Board of Commissioners on Grievances and Discipline are fully supported by the evidence, and such findings are therefore affirmed. The objections to such findings and to the recommendations of the board are overruled. The recommendation of the board that respondent be indefinitely suspended from the practice of law is confirmed, and such discipline is hereby imposed.

Judgment accordingly.

O'NEILL, C. J., WHITESIDE, HERBERT, CORRIGAN, STERN, LEACH and BROWN, JJ., concur.

WHITESIDE, J., of the Tenth Appellate District, sitting for SCHNEIDER, J.